Supreme Court, U. S.
FILED
JUL 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCE GEORGE'S PROPERTIES, INC.,
Appellant,

v.

PRINCE GEORGE'S COUNTY, ET AL.,
Appellee,

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

CALLAHAN & CLEMENTS, CHARTERED,
THOMAS R. CALLAHAN,
JAMES F. CLEMENTS,
2101 Defense Highway,
Crofton, MD 21114,
Attorneys for Appellant.

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

I. Was the Appellant required by Maryland law to exhaust zoning administrative remedies prior to filing its Declaration when it alleged those remedies to be constitutionally defective?

II. Did the trial court err in sustaining, without leave to amend, the Demurrer when the Declaration included allegations that the downzoning of Appellant's property:

(A) Prevented "any and all reasonable use of the subject property";

(B) Effected "the taking of [the] property for public use without the payment of just compensation" "without due process";

(C) Therefore, violated Appellant's rights under the Fifth and Fourteenth Amendments of the U. S. Constitution and under Article III, Section 40 of the Maryland Constitution?

PARTIES TO THE PROCEEDING

Prince George's Properties, Inc.

Prince George's County, Maryland, a body corporate in politic of Maryland.

County Council for Prince George's County, Maryland, sitting as the District in Prince George's County, Maryland.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	III
STATEMENT OF THE CASE	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
SUBSTANTIALITY OF THE QUESTIONS PRESENTED	3
APPENDIX:	
Exhibit A — Order from the Court of Appeals of Maryland	1a
Exhibit B — Unreported Opinion of the Court of Special Appeals of Maryland	2a
Exhibit C — Notice of Appeal to the Supreme Court of the United States	5a

TABLE OF AUTHORITIES

Cases

Agins v. The City of Timburon, Cases No. 79-602, U.S. Supreme Court, September Term, 1979	7
Annotated Code of Maryland, Article 66D, Section 8-106(e), (h) and (i)	3
Constitution of the United States, Fifth and Fourteenth Amendments	2
Donohoe Construction Co. v. Maryland-National Park and Planning Commission, 398 Supp. 21, 29-30 (1975)	7
Hecht v. Crook, 184 Md. 271, 280 (1945)	4
Maryland Constitution, Article 3, Section 40	5, 7
Maryland National Park and Planning Commission v. Chadwick, ____ Md. ____, 405 A.2d 241 (1979).	6
Lomarch Corp. v. Englewood, 51 N.J. 108, 237 A.2d 881 (1968)	7

PREVIOUS PAGE WAS BLANK

PAGE

McLeod v. City of Takoma Park, 257 Md. 477 (1970) 7

Poe v. Baltimore City, 241 Md. 303, 308-309 (1966) 4

Potomac Edison v. Bouton, 43 Md. App. 371 (1979) 5

Sanderson v. Baltimore City, 135 Md. 509 (1920) 4, 7

A copy of the unreported opinion in the Court of Special Appeals of Maryland and the Order denying Certiorari in the Court of Appeals of Maryland are included in this Jurisdictional Statement as Appendices.

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCE GEORGE'S PROPERTIES, INC.,
Appellant,

v.

PRINCE GEORGE'S COUNTY, ET AL.,
Appellee,

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

STATEMENT OF THE CASE

This is an appeal from an Order by the Court of Appeals of Maryland denying the Appellant's Petition for a Writ of Certiorari from the decision from the Court of Special Appeals dated January 16, 1980, with its mandate issued February 15, 1980.

That decision affirmed the March 14, 1979, judgment by the Circuit Court for Prince George's County in the case of *Prince George's Property, Inc. v. Prince George's County, et al.*, Prince George's County Law No. 73,946. The judgment denied Appellant's Motion for Reconsideration of an order sustaining, without leave to amend, a Demurrer to Appellant's Declaration.

The acts of the Appellee, which formed a basis for the Declaration originally filed in the Circuit Court of Prince George's County, were alleged to have been in violation of the Fifth and Fourteenth Amendments of the United States Constitution in the originally filed Declaration itself.

The Constitutional issues were also raised on appeal before the Court of Special Appeals of Maryland, in the Appellant's brief and argument. The Trial Judge denied the viability of the Constitutional argument by sustaining the Appellee's Demurrer without leave to amend, and the Court of Special Appeals did not speak to the Constitutional issues raised in their opinion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT 14, SECTION 1

. . . no State shall make or enforce any law which shall abridge the privileges or amenities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . . .

MARYLAND CONSTITUTION, ARTICLE III, SECTION 40

The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

ANNOTATED CODE OF MARYLAND, ARTICLE 66D, SECTION 8-106(e), (h), (i)

(e) In Prince George's County, any incorporated municipality located in Prince George's County, any person or taxpayer in Prince George's County, the applicant who is an aggrieved party, may have judicial review of any final decision of the district council. Proceedings for review shall be instituted by filing a petition in the Circuit Court of Prince George's County within 30 days after service of the final decisions of the district council, which may be served upon all persons of record at the district council's hearing. Copies of the petition shall be served on the district council and all other persons of record in the manner provided by the rules of court. The filing of the petition does not stay enforcement of the district council's decision; but the district council may do so, or the reviewing court may order a stay upon terms it deems proper.

(h) The review shall be conducted by the court without a jury. In cases of alleged irregularities in procedure before the district council not shown in the record, testimony thereon may be taken in the court. The court upon request shall hear oral argument and receive written briefs.

(i) The court may affirm the decision of the district council or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners have been prejudiced because the administrative findings, inferences, conclusions, or deci-

sions are (1) in violation of constitutional provisions; or (2) in excess of the statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedure; or (4) affected by other error of law; or (5) unsupported by competent, material and substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I.

APPELLANT WAS NOT REQUIRED BY MARYLAND LAW TO EXHAUST ZONING ADMINISTRATIVE REMEDIES WHEN IT ALLEGED THOSE REMEDIES TO BE CONSTITUTIONALLY DEFECTIVE.

The Maryland Court of Appeals has established an exception to the rule of exhaustion of administrative remedies: "Where there is no adequate administrative remedy . . ., we have made it clear that recourse may be had to the courts." *Poe v. Baltimore City*, 241 Md. 303, 308-309 (1966); cites omitted. The Court also has held that a remedy at law, as well as in equity, may be pursued in this situation. See *Poe, supra*, as to an equity remedy; *Hecht v. Crook*, 184 Md. 271, 280 (1945) as to a *mandamus* proceeding; and *Sanderson v. Mayor of Baltimore*, 135 Md. 509, 522-523 (1920) as to an action for damages.

In this case, the primary constitutional defect in the zoning administrative remedy offered by Appellee Prince George's County is that it violates Appellant's right to a jury trial. (This point was argued substantially in the trial court, raised generally by the Appellee on appeal, and addressed particularly on the jury issue by counsel for Appellant at oral argument on the appeal.)

The mandatory language of the Prince George's County zoning appeal law states: "The review shall be conducted by the court without a jury." Annotated Code of Maryland,

Article 66D, Section 8-106 (h).* To the contrary, Maryland's Constitution requires that "the General Assembly shall enact no Law authorizing private property to be taken . . . without just compensation . . . awarded by a jury. . . ." Maryland Constitution, Article III, Section 40.

Appellant submits that the facts and the legal posture of this case differs substantially from those of the cases cited very recently in *Potomac Edison v. Bouton*, as to the limits of jury trials in condemnation cases. 43 Md. App. 371 (1979). In those cases, a court's legal decision of "the right to condemn" was distinguished from a jury's factual decision of the amount of compensation due.

In this case, a different issue of first impression is presented. When a property owner contends that a downzoning constitutes a constitutional taking *as a matter of fact*, does the Maryland Constitution require a jury to determine the *fact* of the taking? This question is one of common sense and fact: whether any reasonable use or any reasonable commercial value for the property is left by the governmental act.

Accordingly, Appellant submits that a jury trial constitutionally is mandated on this question, as well as on the usual question of the precise value of the property taken.

* This prohibition, being enacted later in time and substantive, is not superceded by the procedural Maryland Rule B11.

II.

THE TRIAL COURT ERRED IN SUSTAINING, WITHOUT LEAVE TO AMEND, THE DEMURRER WHEN THE DECLARATION INCLUDED ALLEGATIONS THAT THE DOWNZONING OF APPELLANT'S PROPERTY:

(A) PREVENTED "ANY AND ALL REASONABLE USE OF THE SUBJECT PROPERTY";

(B) EFFECTED "THE TAKING OF THE PROPERTY FOR PUBLIC USE WITHOUT THE PAYMENT OF JUST COMPENSATION" "WITHOUT DUE PROCESS";

(C) THEREFORE, VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE III, SECTION 40 OF THE MARYLAND CONSTITUTION.

The Court of Special Appeals, affirming the lower court in this case, wrote that "[Appellant] argues that a public body may take property without actually taking title to it under [the doctrine of] 'inverse condemnation' but none of the authorities are zoning cases." With all respect to that Honorable Court, Appellant would supplement this statement on a few points.

First, although Appellant had found only non-zoning consideration and application of that doctrine in Maryland at the time it's appeal brief was submitted, counsel for Appellant at oral argument did offer a zoning-related opinion issued by the Court of Appeals of Maryland after the brief's submission. In *Maryland National Park and Planning Commission v. Chadwick*, ____ Md. ____, 405 A.2d 241 (1979), zoning cases were included in a discussion of the rule that "'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" 405 A.2d 247, citing 260 U.S. 393, 416 (1922). The opinion also favorably quoted at length a New Jersey case which "implied [a constitutional] duty and obligation to make payments . . . [even] a temporary

taking of property value. *Lomarch Corp. v. Englewood*, 51 N.J. 108, 237 A.2d 881 (1968), cited in *Chadwick, supra.*

Second, in its appeal brief and at oral argument, Appellant did cite cases in which the Court of Appeals of Maryland had approved actions for legal damages against local governments under Maryland Constitution, Article III, Section 40. E.g., *Sanderson v. Baltimore City*, 135 Md. 509 (1920).

Third, in its brief and at oral argument, it did cite cases in which the Court of Appeals of Maryland recognized the doctrine of "inverse condemnation." E.g., *McLeod v. City of Takoma Park*, 257 Md. 477 (1970). Also, see *Donohoe Construction Co. v. Maryland-National Park and Planning Commission*, 398 Supp. 21, 29-30 (1975), applying Maryland Law, putting the "inverse condemnation" label on *Sanderson*-type cases and inferring that this doctrine would apply to zoning matters, when no exhaustion of remedy problem exists.

Finally, only since the oral arguments of its appeal, Appellant had notice that a case is pending in the United States Supreme Court which apparently will present a request for zoning damages under the "inverse condemnation" doctrine on Federal due process grounds. *Agins v. The City of Timburon*, Case No. 79-602, U.S. Supreme Court, September Term, 1979.

Appellant concedes that the authority today, in Maryland and generally, only has begun to accumulate on the doctrine of "inverse condemnation" in the context of zoning. But, it submits, the historic and constitutional and legal bases of this doctrine are sound, having been applied in related areas and urged by scholars as to zoning for some time. E.g., authorities cited in *Chadwick, supra.*

CONCLUSION

Appellant submits that, because the statutory provisions for zoning appeals in Prince George's County circumvented its constitutional rights, it was entitled to file this case at law for a jury trial.

Appellant also submits that the Maryland Constitution may mandate a jury trial when a property owner files an action for "inverse condemnation" by zoning. If the Declaration filed in this case failed to allege any additional facts sufficient to show such a cause of action, the trial court erred in denying Appellant any opportunity to amend the pleading.

Respectfully submitted,

CALLAHAN & CLEMENTS, CHARTERED,
THOMAS R. CALLAHAN,
JAMES F. CLEMENTS,
2101 Defense Highway,
Crofton, MD 21114,
Attorneys for Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on the 17th day of July, 1980, a copy of the above Statement of Jurisdiction was mailed, postage prepaid, first class mail, to Steven N. Gilbert, Associate County Attorney, Office of the County Attorney, County Administration Building, Upper Marlboro, Maryland 20870.

Thomas R. Callahan

APPENDIX A

In the
Court of Appeals of Maryland

Petition Docket No. 1

September Term, 1980

(No. 478, September Term, 1979
Court of Special Appeals)

Prince George's Properties, Inc.

v.

Prince George's County et al.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURHPY,
Chief Judge.

Date: April 18, 1980.

Appendix B

Unreported

In the
Court of Special Appeals of Maryland

No. 478

September Term, 1979

Prince George's Properties, Inc.

v.

Prince George's County Maryland, et al.

Gilbert, C.J. Thompson Moylan, JJ.

Per Curiam

Filed: January 16, 1980

The County Council for Prince George's County, sitting as the District Council for the Maryland Washington Regional District in Prince George's County, changed the zoning classification of property belonging to Prince George's Properties, Inc., appellant, from the C-1 (Local Commercial) to the R-R (Rural Residential) type.

Appellant filed its declaration, which is the subject of this appeal, alleging that the action of the County in rezoning its property deprived appellant of any and all reasonable use of its property and that such rezoning constituted a taking of property for public use without the payment of just compensation, in violation of the United States Constitution and the Constitution of the State of Maryland. The County demurred to the declaration on the basis that the only legal way to obtain judicial review of zoning actions is by administrative appeal under Chapter 1100, subchapter b of the Maryland Rules, and that no action would lie for damages. Judge Albert T. Blackwell, Jr. sustained the demurrer without leave to appeal. We entirely agree with the trial judge.

County Council v. Carl M. Freeman Associates, Inc., 281 Md. 70, 376 A.2d 860 (1977), held that a Prince George's County sectional map amendment was a final decision which could be appealed under the Maryland Rules. If the jurisdiction of the court is properly invoked, the court may affirm, remand, reverse, or modify the zoning decision under *Md. Code*, Art. 66D, § 8-106(i). Appellant cites no case, and we are aware of none, which permits a recovery of damages. The statutory remedy is exclusive. *See, Hartman v. Prince George's County*, 264 Md. 320, 286 A.2d 88 (1972), *Commissioners of Cambridge v. Henry*, 263 Md. 370, 283 A.2d 415 (1971); *Agrarian, Inc. v. Zoning Inspector*, 262 Md. 329, 277 A.2d 591 (1971); *Poe v. Mayor of Baltimore*, 241 Md. 303, 216 A.2d 707 (1966).

Appellant argues that a public body may take property without actually taking title to it under "inverse condemnation" but none of the authorities are zoning cases. The simple answer to appellant's argument is that if what he alleged is true, that is, that the zoning leaves no reasonable use for its property, then the zoning is not valid and will be so declared in appropriate proceedings. The appellant has suffered no legal damages.

Appellees' motion to dismiss the appeal on the basis that the record extract was inadequate was withdrawn at oral argument. We will not dismiss the appeal *sua sponte* because the materials omitted from the original extract were subsequently supplied by the parties.

Judgment Affirmed.
Appellant to Pay the Costs.

Appendix C

In the
Court of Appeals of Maryland

Petition Docket No. 1

September Term, 1980

(No. 478, September Term, 1979
Court of Special Appeals)

Prince George's Properties, Inc.,
Petitioner,

v.

Prince George's County, et. al.,
Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Prince George's Properties, Inc., the Appellant, above-named, hereby appeals to the Supreme Court of the United States, from the final Order of the Court of Appeals of Maryland, denying that Appellant's Petition for a Writ of Certiorari, entered in the above-captioned case on April 18, 1980.

CALLAHAN & CLEMENTS, CHARTERED,

BY THOMAS R. CALLAHAN

BY JAMES F. CLEMENTS

2101 Defense Highway
Crofton, MD 21114
(301) 261-0005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 1980, a copy of the aforegoing Notice of Appeal to the Supreme Court of the United States was mailed, via first class mail, postage prepaid, to Steven M. Gilbert, Esq., Associate County Attorney for Prince George's County, Maryland, County Administration Building, Upper Marlboro, Maryland 20870.

THOMAS R. CALLAHAN

Filed this 17th day of July, 1980, in the Court of Appeals of Maryland.

Supreme Court, U. S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-80

IN THE

Supreme Court of the United States

October Term, 1980

PRINCE GEORGE'S PROPERTIES, INC.
Appellant,

vs.

PRINCE GEORGE'S COUNTY, *et al.*,
Appellees.

On Appeal From the
Court of Appeals of Maryland

MOTION TO DISMISS OR AFFIRM

ROBERT B. OSTROM
MICHAEL O. CONNAUGHTON
STEVEN M. GILBERT
5104 County Administration Bldg.
Upper Marlboro, Maryland 20870
301-952-4347
Attorneys for Appellees

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION TO DISMISS OR AFFIRM 1

I. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION 2

II. THE FEDERAL QUESTIONS PRESENTED HERE WERE NOT RAISED WITH EFFECT BELOW AND WERE NOT PASSED ON BY THE COURTS BELOW 4

III. THE JUDGMENT AND ORDER BELOW REST ON AN ADEQUATE NON-FEDERAL BASIS 5

IV. THIS APPEAL HAS NOT BEEN TAKEN IN FULL COMPLIANCE WITH THIS COURT'S RULES 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

A. Cases

Agins v. City of Tiburon,
____ U.S. ____, 100 S.Ct. 2138 (1980) 3

Brady v. Southern Ry. Co.,
320 U.S. 476 (1943) 3

Colgrove v. Battin,
413 U.S. 149 (1973) 3

County Council v. District Land Corp.,
274 Md. 691, 337 A.2d 712 (1975) 4

Page

Curtis v. Loether,
415 U.S. 189 (1974) 2

Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.,
284 U.S. 151 (1931) 2

Maryland-Nat'l. Cap. Park & Pl. Comm'n. v. Chadwick,
286 Md. 1, 405 A.2d 241 (1979) 4

Mayor & City Council v. Borinsky,
239 Md. 611, 212 A.2d 508 (1965) 4-5

Mayor & Council v. Stone,
271 Md. 655, 319 A.2d 536 (1974) 4

New York Cent. R. Co. v. White,
243 U.S. 188 (1917) 2

Orr v. Orr,
____ U.S. ____, 99 S.Ct. 1102 (1979) 5

Parklane Hosiery Co. v. Shore,
____ U.S. ____, 99 S.Ct. 645 (1979) 3

Street v. New York,
394 U.S. 576 (1969) 4

Wagner Elec. Mfg. Co. v. Lyndon,
262 U.S. 226(1923) 2

Wolfe v. North Carolina,
364 U.S. 177 (1960) 5

B. Constitutional Provisions, Statutes, and Rules

Fifth Amendment to U.S. Constitution 2

Seventh Amendment to U.S. Constitution 2, 3

Fourteenth Amendment to U.S. Constitution 2, 5

Page

28 U.S.C. §1257 (1970) 6

MD. ANN. CODE, Art. 66D §8-106 (1978 Repl. Vol. & 1979 Cum. Supp.) 3, 6

Supreme Court Rules

Rule 10.2 6
Rule 12.3 6
Rule 15.1 6
Rule 16.1 ..... 3, 5
Rule 28.4 6

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-80

PRINCE GEORGE'S PROPERTIES, INC.
Appellant,

vs.

PRINCE GEORGE'S COUNTY, *et al.*,
Appellees.

On Appeal From the
Court of Appeals of Maryland

MOTION TO DISMISS OR AFFIRM

Appellees Prince George's County, Maryland, and County Council of Prince George's County, by their attorneys, Robert B. Ostrom, Michael O. Connaughton, and Steven M. Gilbert, respectfully move the Court for dismissal of this appeal, or, in the alternative, for affirmance of the judgment and order entered below. The grounds for this motion are as follows:

I

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In its jurisdictional statement, appellant Prince George's Properties, Inc. (hereinafter "PGP") appears to set forth the following questions:

> 1. Whether PGP was required to exhaust administrative remedies prior to suing the zoning authority for damages for rezoning its property, when it claimed the remedies were unconstitutional because they did not provide for trial by jury.
>
> 2. Whether PGP's declaration at law in state court for damages against the zoning authority for rezoning its land states a cause of action under the Fifth and Fourteenth Amendments.

The questions as stated here are summarized from the various statements and points of argument included in PGP's jurisdictional statement.

Neither question is a substantial one under federal law, and neither merits full review by this Court.

The first question appears to be founded on a claim that one has a constitutional right to a jury trial in a civil case in state court. But this Court has never held that the due process clause of the Fourteenth Amendment incorporates the jury trial provisions of the Seventh Amendment. A litigant has no federal constitutional right to trial by jury in a civil action brought in state court. *Curtis v. Loether,* 415 U.S. 189, 192 n.6 (1974); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.,* 284 U.S. 151, 155 (1931); *Wagner Elec. Mfg. Co. v. Lyndon,* 262 U.S. 226, 232 (1923); *New York Cent. R. Co. v. White,* 243 U.S. 188, 208 (1917); *see*

Colgrove v. Battin, 413 U.S. 149, 169 n.4 (1973) (dissenting opinion); *Brady v. Southern Ry. Co.,* 320 U.S. 476, 479 (1943). The recent discussion in *Parklane Hosiery Co. v. Shore,* ____ U.S. ____, ____, 99 S.Ct. 645, 655-657 (1979) (dissenting opinion) indicates some historical bases for the Seventh Amendment and, indirectly, why this Court has never required state courts to follow it.

Second, the question regarding a right to damages for the rezoning of private property was resolved by the Maryland courts by deciding that PGP would have a right, in an appropriate proceeding, to have the validity of the zoning of its property tested and ruled upon. Jurisdictional Statement at 3a; MD. ANN. CODE, Art. 66D §8-106 (1978 Repl. Vol. & 1979 Cum. Supp.). This question as to the procedure Maryland affords civil litigants asserting private property rights has no federal content or importance.

Third, PGP has never claimed in prior proceedings, and does not claim in its jurisdictional statement, that Maryland's procedure confining judicial review of a zoning action to validity, without the possibility of an award of damages, is unconstitutional *because* review is restricted to validity. *Cf. Agins v. City of Tiburon,* ____U.S. ____, ____, 100 S.Ct. 2138, 2143 (1980) (question "whether a State may limit the remedies available to a person whose land has been taken without just compensation" not considered). PGP's claims in this case have been restricted to its "taking" argument, its argument that taking is a factual issue, and its assertion that trial by jury is required.

It is submitted that PGP's federal constitutional claims are so insubstantial that this Court should decline to note jurisdiction. Rule 16.1(b), Supreme Court Rules.

II.

THE FEDERAL QUESTIONS PRESENTED HERE WERE NOT RAISED WITH EFFECT BELOW AND WERE NOT PASSED ON BY THE COURTS BELOW.

It was held in *Street v. New York,* 394 U.S. 576, 581-582 (1969), that this Court's jurisdiction on appeal from a state court depends on the proper presentation of a federal constitutional question below. The Court, by Mr. Justice Harlan, also stated:

> [W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Id. at 582.

The opinion of the Court of Special Appeals of Maryland (Jurisdictional Statement at 2a-4a), which is the only written opinion in this case, did not pass on either of the questions PGP seeks to raise in this Court. That court *assumed* an unconstitutional taking of PGP's property and held that PGP's rights under Maryland law were improperly asserted in an action at law for damages.

The questions PGP raises here are so insubstantial and were so ineffectively asserted below that the Maryland courts did not pass on them. Yet "taking" claims in general, *e.g., Maryland-Nat'l Cap. Park & Pl. Comm'n. v. Chadwick,* 286 Md. 1, 405 A.2d 241 (1979); *County Council v. District Land Corp.,* 274 Md. 691, 337 A.2d 712 (1975); *Mayor & Council v. Stone,* 271 Md. 655, 319 A.2d 536 (1974); *Mayor & City Council v. Borinsky,* 239 Md.

611, 212 A.2d 508 (1965), have been of great interest in Maryland in zoning and similar types of cases.

It is submitted that the insubstantiality of PGP's federal claims is supported to a great degree by the failure of the Maryland courts below to pass on them. Rule 16.1(b), Supreme Court Rules.

III.

THE JUDGMENT AND ORDER BELOW REST ON AN ADEQUATE NON-FEDERAL BASIS.

PGP's appeal rests not on its assertion that confining the remedy in zoning cases in Maryland to a declaration of validity is itself unconstitutional under the Fourteenth Amendment. Rather, PGP says that the remedy in Maryland is unconstitutional because it is deprived of a jury trial. But since jury trials are not constitutionally required in state courts in civil cases, and since Maryland courts in this case have said that a testing of the subject rezoning's validity is available, the judgment below is supported by the ruling that there are remedies other than the one PGP chose in bringing this action. There is a complete and adequate non-federal basis for the actions of the Court of Appeals and Court of Special Appeals of Maryland in this case. *See Wolfe v. North Carolina,* 364 U.S. 177, 195 (1960); *cf. Orr v. Orr,* ____ U.S. ____, ____, 99 S.Ct. 1102, 1109 (1979).

Since there is an adequate non-federal basis for the judgment and order entered below, this Court should decline to note jurisdiction. Rule 16.1(b), Supreme Court Rules.

IV.

THIS APPEAL HAS NOT BEEN TAKEN IN FULL COMPLIANCE WITH THIS COURT'S RULES.

As a final point, appellees would note PGP's failure to comply with this Court's rules, in several respects.

First, PGP does not indicate in its notice of appeal "the statute or statutes under which the appeal to this Court is taken," as required by Rule 10.2. No statutory citation is given in the jurisdictional statement, either, as is required by Rule 15.1(e)(iii). It is assumed herein that this appeal is filed under 28 U.S.C. §1257(2)(1970).

Second, appellees were not notified, as required by Rule 12.3, of the date of docketing and the docket number of this case at the time this appeal was filed.

Third, if this appeal is filed to challenge the constitutionality of MD. ANN. CODE, Art. 66D §8-106 (1978 Repl. Vol. & 1979 Cum. Supp.), PGP appears not to have served the notice required by Rule 28.4(c) on the Attorney General of Maryland. (The cited statute is a public general law of the State of Maryland, and Prince George's County is not an "agency" of the State.)

None of these violations of this Court's Rules are serious, perhaps, but taken together they amount to one additional reason why this Court should decline jurisdiction in this case.

CONCLUSION

For the reasons stated above, this appeal should be dismissed, or the judgment and order below should be affirmed.

Respectfully submitted,

ROBERT B. OSTROM
County Attorney

MICHAEL O. CONNAUGHTON
Deputy County Attorney

STEVEN M. GILBERT
Associate County Attorney

5104 County Administration Bldg.
Upper Marlboro, Maryland 20870
301-952-4347